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Supreme Court, U.S.
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No. 08 -

In The
SUPREME COURT OF THE UNITED STATES

Michael Kirlew, (Agency No. 30-093-662)
Petitioner,
vs.
Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Several congressional statutes and administrative regulations address the issue of the circumstances under which federal and administrative judges become subject to the requirements of recusal. Specifically, federal statutes 28 United States Code sections 144 and 455 as well as administrative regulation 8 Code of Federal Regulations section 1240.1 have been deemed to be applicable in the administrative adjudication process. Generally, the statutes/regulations provide that recusal is appropriate where the judge in question exhibits personal bias or prejudice against a party or in favor of another party, or upon the unilateral determination of the immigration judge that she is disqualified from further involvement in the proceeding. The recusal standards of 28 USC section 455 have been interpreted by this court as usually requiring an extrajudicial factor suggestive of bias or prejudice as harsh, negative and hostile comments rendered during a pending matter by a judge towards a party are unlikely, standing alone, to require recusal.

The parameters of what constitutes an extrajudicial factor have not been clarified by precedential decisions rendered by this court or the circuit courts. Similarly, the decisions that have addressed the issue of judicial recusal have not discussed what obligations are imposed upon a judge subject to a recusal request and a prosecutor who objects to a recusal request to refute the specific facts asserted as the basis for the requested

recusal during the trial proceedings or the obligation of an appeals court to remand an appeal to the trial court for further hearing where the first assertion that the record is insufficient to support the facts asserted in the recusal request is raised sua sponte by the appellate court on administrative review.

Similarly, the parameters of what constitutes clear and convincing evidence justifying a determination that an alien is an aggravated felon under *Woodby v. INS*, 385 US 276 (1966). Petitioner challenges the assertion of the Court of Appeals that inferences drawn by the trier of fact based solely upon the government's evidence "taken as a whole" are sufficient to meet the clear and convincing evidence standard.

The questions presented are:

I. Whether the Court of Appeals erred in failing to consider extrajudicial factors relevant to issue of whether the Executive Office For Immigration Review properly the decision of the immigration judge denying Petitioner's motion for recusal, due to pervasive bias and prejudice directed toward Counsel, and remand the proceedings for further hearing, where Petitioner presented relevant and material extrajudicial factors supporting the recusal request that originated both prior to the initiation of the Petitioner's removal proceedings and subsequent thereto due to its determination that the evidence of record did not support the factual assertions upon which the recusal request was based, where no challenge to the

sufficiency of the evidence below, the issue was raised for the first time, sua sponte, by the administrative appellate body with no notice or opportunity to amend the record being provided to Petitioner prior to the entry of the adverse decision?

II. Whether the Court of Appeals erred in determining that the Petitioner's criminal conspiracy conviction constituted an aggravated felony, based on its assertion that the government's evidence "taken as a whole" supported the aggravated felony determination, where the government's evidence failed to identify or establish what specific criminal offense served as the object of the criminal conspiracy, as mere finding that an alien has been convicted of criminal conspiracy under Pennsylvania statute asserted, Title 18 PA CS section 903 does not, ***necessarily*** , mandate a determination that the alien is an aggravated felon under Immigration and Nationality Act section 237(a)(2)(A)(iii), especially in view of the decision of the 3rd Circuit in *Jeune v. Attorney General*, 476 F.3d 199 (3rd Cir. 2007) and in view of the decision of this court in *Woodby v. INS*, 385 US 276 (1966), that the evidence submitted by the agency in support of an alien's removal be clear and convincing?

CORPORATE DISCLOSURE STATEMENT

Michael Kirlew is an individual and has no corporate involvement relevant to these proceedings.

TABLE OF CONTENTS

Questions Presented.....i- iii
Corporate Disclosure Statement.....iv
Table of Contents.....v
Table of Authorities.....v - vii
Opinions Below..... 1
Jurisdiction.....1
Statutory Provisions Involved.....1- 2
Parties To The Proceedings..... 2
Statement Of The Case.....3- 6
1. Federal Appellate background.....3
2. Background In Administrative Proceedings.....
.....3- 6
Reasons for granting the Petition.....6- 30
Conclusion.....31
Appendices.....A-1 - A-29

TABLE OF AUTHORITIES

CASES-

Accardi v. Shaughnessy, 347 US 260 (1954).....22
Berger v. United States, 295 US 78 (1953).....21
Carrillo- Gonzales v. INS, 353 F.3d 1077
(9th Cir. 2003).....19
Clemmons v. Wolfe, 377 F.3d 322 (3rd Cir. 2004).....11
Colmanar v. INS, 210 F3d 97 (9th Cir. 2000).....22, 23
Dia v. Attorney General, 353 F.3d 228
(3rd Cir. 2003).....7, 22
Fiadjoe v. Attorney General, 411 F.3d 135
(3rd Cir. 2005).....7

Fong Haw Tan v. Phelan, 333 US (1948).....23
Garcia v. Attorney General, 462 F.3d 287
(3rd Cir. 2006).....26, 27
Gerbier v. Holmes, 280 F.3d 297
(3rd Cir. 2002).....29
Jeune v. Attorney General, 476 F.3d 199
(3rd Cir. 2007).....i, iii, 22, 25, 26, 27, 28, 31
Korytnyuk v. Ashcroft, 396 F.3d 272 (3rd Cir. 2005)...7
Litkey v. United States, 510 US 540 (1994).....3, 6, 8
Marshall v. Jerico, Inc., 446 US 238 (1980).....12
Matter of Chartier, 16 I&N Dec. 284 (BIA 1977).....24
Matter of Exame, 18 I&N Dec. 303 (BIA 1982).....21
Matter of G-, 9 I&N Dec. 159 (AG 1961).....23
Matter of Guevara, 20 I&N Dec. 238 (BIA 1991).....23
Matter of Teixeira, 21 I&N Dec. 316 (BIA 1996).....24
Murphy v. INS, 54 F.3d 608 (9th Cir. 1995).....22
Offut v. United States, 348 US 11 (1954).....7
Reyes-Melendez v. INS, 342 F.3d 1001
(9th Cir. 2003).....7
United States v. Reynolds, 345 US 1, (1953).....20, 21
Wang v. Attorney General, 423 F.3d 260
(3rd Cir. 2005).....7, 11, 12
Woodby v. INS, 385 US 276 (1966).....
.....ii, iii, 20, 22, 23, 25, 30, 31

STATUTES-

8 United States Code Section 1101(a)(43)(B).....3
8 United States Code Section 1101(a)(43)(U).....3
8 United States Code Section 1227(a)(2)(A)(iii) .....
.....iii, 2, 3
28 United States Code Section 1254(1).....1

28 United States Code Section 144..... i, 1, 21
28 United States Code 455.....i, 2, 4, 21
18 Pennsylvania Consolidated Statutes Section 903 ....
.....iii, 27
35 Pennsylvania Consolidated Statutes
Section 780-113(f).....29
35 Pennsylvania Consolidated Statutes
Section 780-113(a)(30).....26, 27

REGULATIONS-

8 Code of Federal Regulations Section 1003.41.....24
8 Code of Federal Regulations Section 1240.1(b)..i, 21

OTHER AUTHORITIES

Immigration Law and Crimes, Kesselbrenner and
Rosenberg,(2002).....29

TABLE OF APPENDICES

Appendix A - February 27, 2008 Decision of the US
Court Of Appeals For the Third Circuit, ...(A-1 - A-9)
Appendix B - June 16, 2006 Decision of the Board Of
Immigration Appeals,.....(A-10 - A-12)
Appendix C - April 27, 2006 Opinion of The Board Of
Immigration Appeals,.....(A-12 - A-13)
Appendix D- November 30, 2005 Opinion of the
Immigration Judge.....(A-18 - A-20)
Appendix E-November 29, 2005 Opinion of the
Immigration Judge.....(A-21 - A-29)

OPINIONS BELOW

The opinion of the Court of Appeals below, dated February 27, 2008 is unreported and is reprinted at Appendix A. The opinions of the Board of Immigration Appeals, dated April 27, 2006 and June 16, 2006 are reprinted at Appendices B and C, respectively. The decisions of the immigration judge, dated November 29, 2005 and November 30, 2005 are reprinted at Appendices D and E, respectively.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Review was entered on February 27, 2008. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth as follows:

28 US Code section 144:

Bias Or Prejudice of judge-

> Whenever a party to any court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 US Code section 455:
Disqualification of Justice, Judge or Magistrate Judge-

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He should also disqualify himself in the following circumstances:

(1) He has a personal bias or prejudice concerning a party...

8 USC section 1227(a)(2)(A)(iii)-
Aggravated felony:

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

PARTIES TO THE PROCEEDINGS

Petitioner is Michael Kirlew a native and citizen of the nation of Jamaica. Respondent is Michael B. Mukasey, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Federal Appellate Background-

The US Court of Appeals for the Third Circuit dismissed the Petition for Review of Petitioner, Michael Kirlew, upon its assertion that the Petitioner's challenge to the agency's determination that he is subject to removal was unfounded as it determined that the agency established Petitioner's removability by clear and convincing evidence. Moreover, it asserted that the Petitioner's challenge to the agency's denial of his request for the recusal of the immigration judge due to bias and prejudice against Counsel was foreclosed by the decision of this court in *Litkey v. United States*, 510 US 540 (1994) Additionally, the Court of Appeals denied Petitioner's motions for remand and to supplement the record.

2. Background In Administrative Proceedings -

Petitioner, Michael Kirlew, is a native and citizen of Jamaica who has held status as a lawful permanent resident since September 11, 1973. The agency placed the Petitioner into proceedings asserting, through its notice to appear, that the Petitioner was subject to removal for having several criminal convictions, including ones involving marijuana and a firearm. The specific offense relevant in this action relates to the assertion of the agency that the Petitioner was subject to removal pursuant to INA section 237(a)(2)(A)(iii) as an aggravated felon, defined as drug trafficking at INA section 101(a)(43)(B), and (U) for the conspiracy element of the offense.

During the course of the removal proceedings, the Petitioner requested that the immigration judge recuse herself from further involvement in the Petitioner's removal proceedings as he believed that she displayed bias and prejudice toward Counsel of the sort specified at 28 USC section 455. He asserted that her rulings in his proceedings were contradicted by the very cases she cited in support of her legal rationale, she ignored obvious defects in the evidence presented by the agency to meet its burden to establish Petitioner's removability by clear and convincing evidence, she was verbally abusive to Counsel and had exhibited a pattern of hostility to Counsel in other proceedings.

The agency filed an objection to the motion for recusal denying that the conduct of the immigration judge in the Petitioner's proceedings had been improper and asserting that the agency attorney present on the date in which the alleged verbal abuse occurred denied that such abuse occurred. The government's opposition was prepared by an attorney other than the one assigned to the court on the day in question. The agency provided no evidence to corroborate the claim that the attorney present when the alleged verbal abuse occurred denied Petitioner's assertions and Petitioner challenged the government's contention. The government never provided any proof or verification that the attorney made the assertions claimed. Neither the government nor the immigration judge challenge any of Petitioner's specific assertions that the immigration judge had engaged in misconduct toward Counsel in other proceedings.

The immigration judge denied the motion for recusal on or about November 29, 2005 and entered an order of removal against the Petitioner on or about November 30, 2005.

The Petitioner filed an appeal of the decision of the immigration judge with the Board of Immigration Appeals. The agency filed no responsive briefing on the appeal. On or about April 27, 2006, the Board denied the Petitioner's appeal, finding that the immigration judge properly sustained the agency's removal charges and rejected the Petitioner's assertion of misconduct as "frivolous" finding, sua sponte, that the assertions of misconduct were not supported by documentary evidence. Notwithstanding the fact that both the agency and the immigration judge failed to present any such challenge prior to the entry of the Board's decision, Petitioner was not given notice of this issue nor the opportunity to correct the alleged defect. Further, the Board's order contained no legal analysis regarding the merits of the appeal, and cited no legal authority or analysis on the recusal issue.

The Petitioner then sought reopening and reconsideration of the Board's decision as his 2001 marijuana conviction had been vacated on May 11, 2006. The Board denied the motion to reopen and reconsider on or about June 16, 2006

The Petitioner filed a petition for review with the circuit court regarding the April 27 administrative decision and requested a stay of removal. A temporary stay that was granted. The Petitioner also filed a petition for review on the decision entered on June 16.

The temporary stay of removal that was granted was later lifted and the Petitioner was eventually removed to Jamaica where he now resides.

On or about February 27, 2008, the US Court of Appeals for the 3rd Circuit denied Petitioner's petitions for review.

REASONS FOR GRANTING THE PETITION

I.

The Court of Appeals Erred in its refusal to remand Petitioner's proceedings for a proper evaluation of his assertion of bias and prejudice on the part of the immigration judge in the removal proceedings. The Court of Appeals provided no analysis as to why the incidents referenced in support of Petitioner's assertion of bias and prejudice were insufficient to constitute the external factors described by this court in *Litkey v. United States*, (supra), nor did it explain why it rejected the Petitioner's challenge to the denial of his recusal request based on insufficient evidence on the record where the agency, and immigration judge waived that issue in the proceedings below, nor did it attempt to reconcile its adverse determination with its other precedential decisions regarding judicial recusal and immigration judge misconduct .

- State of the Law-

The US Court of Appeals for the 3rd Circuit has determined that an immigration judge's conduct that is abusive and bullying in nature warrants further investigation into the propriety of his adverse legal

findings. *Fiadjoe v. Attorney General*, 411 F.3d 135 (3rd Cir. 2005) Further, such hostile conduct of an immigration judge can warrant the reversal of his adverse legal findings. *Korytnyuk v. Ashcroft*, 396 F.3d 272 (3rd Cir. 2005) Additionally, where an immigration judge looks for ways to render an adverse decision, the decision is not supported by substantial evidence. *Dia v. Ashcroft*, 353 F.3d 228 (3rd Cir. 2003) Moreover, the court has stated that the process through which justice is dispensed must itself appear just recognizing the determination of this court in *Offut v. United States*, 348 US 11 (1954) Additionally, the 3rd Circuit and other circuit courts have noted an increase in a repeated pattern of misconduct by immigration judges in recent years. *Wang v. Attorney General*, 423 F.3d 260 (3rd Cir. 2005) [See also, *Reyes-Melendez v. INS*, 342 F.3d 1001 (9th Cir. 2003)]

-Bias and Prejudicial conduct of the Immigration Judge-

In the Petitioner's removal proceedings before the immigration judge, the Petitioner had requested that the immigration judge recuse herself due to what Petitioner believed were her repeated and unjustified adverse rulings regarding the Petitioner's challenge to the government's removal efforts and his custody that were unsubstantiated under law and contradictory to findings in legal authority relied upon by the immigration judge.

Specifically, Petitioner's Counsel noted that the immigration judge attempted to justify her adverse determinations in Petitioner's proceeding based on

an unpublished Board decision, *In re Humber*, that contradicted her analysis; cited as "evidence" in support of her rulings Pennsylvania procedural rules that the Pennsylvania legislature specifically asserted did not constitute evidence and were inoperative to serve as evidence in the manner used by the immigration judge; asserted that Counsel provided ineffective assistance to Petitioner, in open court and on the record due to Counsel's "failure" to misapply Pennsylvania procedural rules.

Additionally, the Petitioner and his wife both submitted affidavits with the motion for recusal and asserted that the immigration judge's misconduct included screaming at Counsel and being verbally abusive.

In addition to the events arising at the Petitioner's removal hearing, Counsel provided information in the materials submitted in connection with the motion for recusal in which she recounted numerous instances of hostile and abusive treatment by the immigration judge in cases in which Counsel represented a variety of individuals over a period of many years. Petitioner asserted that these instances constituted the necessary extrajudicial factors referenced by this court in *Litkey* (supra).

-Extrajudicial Factors-

Petitioner's presentation recounted multiple displays of prejudice and bias against Counsel by the immigration judge, including citation of cases that clearly did not support her adverse legal rulings. Specifically, Counsel provided the following

examples of prejudice and bias of the immigration judge occurring outside of the Petitioner's removal proceedings: assertions in other removal proceedings that Counsel provided "ineffective assistance" to other of her clients based on the assertion that Counsel "failed" to file documents with the court that the judge had already stated on the record were unnecessary to file, including one case in which the agency did not oppose Counsel's motion for remand submitted to the Board of Immigration Appeals. In that alien's case appeal was sustained and the request for remand was granted; Petitioner also referenced attempts by the immigration judge to intimidate Counsel's former clients into filing disciplinary complaints against Counsel.

Further, Petitioner noted the immigration judge's citation to inapplicable rules under the Pennsylvania Rules of Professional Conduct as grounds for her refusal to permit Counsel's withdrawal in other cases; making multiple threats to "report" Counsel to EOIR disciplinary counsel; the immigration judge's act of hurling personal invective against Counsel in proceedings on the record, as was reported to Counsel by an agency attorney, who characterized the immigration judge as having "lambasted" Counsel in open court. Said attorney has never retracted his assertions nor has he ever denied having informed Counsel about the immigration judge's conduct.

The case names and agency docket numbers for all of these cases in which Petitioner asserted judicial bias and prejudice were provided in the documents

requesting recusal.

Moreover, Counsel also noted that she and another immigration attorney met with EOIR officials as part of the agency's nationwide audit of immigration courts on or about May 1, 2006. When concerns about the conduct of this immigration judge were raised, the EOIR officials asserted that they were well aware of the numerous complaints about her conduct, including assertions that she reduced at least two female attorneys to tears during removal hearings due to her verbal and other abusive and intimidating behavior in court.

In response to these assertions, the immigration judge refused to recuse herself, asserting that even though her conduct may have been "rude", recusal was not mandated. Importantly, the immigration judge made no reference to these extrajudicial factors in her denial of the motion for recusal. She claimed that the only stated reasons for the recusal request was her denial of bond request and her denial of his request to withdraw his prior pleas. While these were factors, the Petitioner also noted that the immigration judge relied upon legal authorities that did not support her legal analysis to render the adverse decisions, displayed abusive conduct towards Counsel in the proceedings ***AND*** had an established practice of engaging in such conduct with Counsel.

The fact that the immigration judge had specific knowledge of the extrajudicial factors cited here by the Petitioner and, thus an opportunity to challenge the assertions made against her, but did not, or provide

any explanation as to why they were irrelevant to the recusal request can not be over stated. Accordingly, the fact that she failed to reference these factors in her decision on the motion for recusal and proceeded as if they had never been raised was a serious flaw in the Respondent's adjudication of the recusal request that should have been considered by the Court of Appeals.

Similarly, even if the statement of the Court of Appeals that it could not make a determination regarding these extrajudicial facts because documents were not in the file was true, that fact should not have precluded the court from remanding the matter for further adjudication by the Board as the Petitioner requested. The level of abuse and the extensive nature of the misconduct was sufficiently severe to require that they be taken seriously rather than turn a blind eye. This is especially so given the fact that no challenge to the recusal request was ever presented during the administrative proceedings.

Thus, while individually, the incidents alleged by the Petitioner might not be deemed to amount to bias or prejudice, under the "pervasive" misconduct standard applicable within the Third Circuit, the incidents, in the aggregate, were sufficient to establish legitimate grounds for recusal as the circumstances originated from factors external to the Petitioner's removal proceedings. This is especially so given the fact that the 3rd Circuit has stated that the "'...mere appearance of bias...could still diminish the stature ' (of a legal proceeding)" *Clemmons v. Wolfe*, 377 F.3d 322 (3rd Cir. 2004)[as cited in *Wang v. Attorney*

General, 423 F.3d 260, 269 (3rd Cir. 2005)]

This court has also noted the importance of a court's appearance of impartiality as reflected by its assertion in *Marshall v. Jerico, Inc.*, 446 US 238, 242 (1980), that, " ...no person (may) be deprived of his interests in the absence of a proceeding in which he may present his case with the assurance that the arbiter is not predisposed to find against him." [as quoted in *Wang v. Attorney General*, (supra)]

Thus, while the 3rd Circuit characterized these incidents as "occasional", Petitioner referenced abusive behavior of the immigration judge toward his Counsel in at least 5 separate proceedings Additionally, while the Court of Appeals viewed the conduct of the immigration judge as reflective of hostility, the conduct in question far exceeded mere hostility. An immigration judge who makes personal comments about an attorney, tries to have clients file disciplinary actions against the attorney, calls the attorney "ineffective" for not having done an act that the immigration judge excused her from doing, who based her adverse rulings on legal citations that did not support her legal conclusions, exaggerates her leniency toward Petitioner by overstating the number of continuances granted to his Counsel and who makes serial misrepresentations to disciplinary authorities has displayed acts that, in their totality, indicate pervasive bias. The fact that none of Counsel's clients has ever followed the suggestion of the immigration judge to file a complaint against Counsel is a strong indication that the multiple suggestions that they do so

were advanced by the immigration judge for highly improper, prejudicial and biased, if not unethical, reasons.

Further, while the court attempted to characterize the conduct of the immigration judge as evidence of as "impatient" behavior attempted to diminish the abusive nature of the immigration judge towards counsel by asserting that the immigration judge had granted Petitioner and Counsel two continuances so that he could pursue relief that statement is not accurate.

The Petitioner appeared at his first hearing on August 18, without counsel, so the hearing was continued. He next appeared with former counsel on September 7, 2005 and the immigration judge granted former counsel a continuance to research the case. Counsel first appeared as the Petitioner's representative on September 29 and requested bond. Though the hearing was continued, it was not continued for the Petitioner's benefit, it was continued for the benefit of the agency so that it could respond to the bond request. At the next listing on October 13, the immigration judge made an interlocutory bond determination and continued the matter upon her requirement that Counsel research the Pennsylvania Rules of Criminal Procedure for "evidence" of whether the Petitioner was arrested in 2001. On October 31, Petitioner's recusal request was submitted and the government was given an opportunity to reply. The last hearing was held on November 30 and on that

date the removal order was entered.[1]

-Misconduct of Agency Attorney-

In addition to the assertions of misconduct by the immigration judge, the Petitioner has asserted misconduct on the part of one of the attorneys representing the agency during his removal proceedings. The government attorney in question opposed Petitioner's motion for recusal and claimed a colleague who had been the agency representative during the October 13 proceeding at which the

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[1]In her decision denying the Petitioner's motion for recusal, the immigration judge claimed that shehad given the Petitioner 4 continuances since the date that Counsel began representing him until the date on which the decision was prepared, as alleged evidence of her fairhandedness in presiding over the Petitioner's immigration proceedings. That assertion of the immigration judge was yet another misrepresentation because, as of that date, Counsel had not yet even appeared at four hearings for the Petitioner. Further, as was discussed more fully above, on two occasions continuances were given to government counsel so that the agency could respond to the Petitioner's request for bond and recusal. The one date on which it is possible to claim that a continuance was granted for the Petitioner's benefit was October 13 when the immigration judge continued the proceedings upon her demand that Counsel produce evidence from the Pennsylvania Rules of Criminal Procedure for use in the bond proceeding.

asserted verbal abuse occurred, also refuted Petitioner's allegations of judicial misconduct. The colleague is alleged to have told the attorney in question that he "had no recollection" of abusive conduct by the immigration judge at the referenced hearing. Petitioner specifically challenged the assertion that the attorney's colleague had ever made any such statement. The colleague never affirmed or otherwise verified the assertion made by the attorney in question. The Court of Appeals refused to address this issue due to its determination that the motion for recusal had been properly denied.

-Misconduct in the post administrative proceeding setting -

Unfortunately, the misconduct of the immigration judge and the agency attorney did not end with the conclusion of the removal proceedings. Petitioner presented his concerns about the conduct of the government attorney and immigration judge to state bar disciplinary authorities in whose jurisdiction these attorneys were admitted. The agency attorney, in response to an inquiry of the Maryland Bar, invited the authorities to place a ***private telephone call*** to the colleague who allegedly had "no recollection" of the immigration judge's abusive behavior at the October 13, 2005 hearing, rather than require him to submit written verification that his representations regarding his colleague's statements were true.

Notwithstanding the fact that such a request for a private ex parte conversation between the disciplinary authorities is troubling, for obvious reasons, the

Court of Appeals denied Petitioner's request to supplement the record to include documentation of the government attorney's conduct, as the conduct occurred subsequently to the conclusion of the removal proceedings. Petitioner asserts that the Court erred in both refusing to supplement the record and in its refusal to remand the appeal for a reexamination of the issue of recusal by the agency, as this conduct was an additional external factor relevant to the recusal issue as it was highly suggestive of improper motivations on the part of the government attorney in advancing the agency's opposition to Petitioner's motion for remand.

Similarly, the immigration judge, when required to reply to a discipline inquiry required by the DC Bar authorities, claimed that there were documents in the official record showing that the Petitioner had filed an ineffective assistance of counsel complaint against Counsel, when in fact she knew or had reason to know, that Petitioner never filed any such complaint. She further claimed that EOIR Bar Counsel had no jurisdiction to investigate her conduct and any investigation being initiated by that agency related solely, and necessarily, to Counsel's misconduct, when, in fact, one of the primary responsibilities of Bar Counsel is to provide ethical guidance to EOIR employees such as her self. She further claimed that Bar Counsel was investigating Counsel. Two years have passed since the Board referred the complaints about the immigration judge's misconduct to Bar Counsel and Counsel has received no notice that she is

under investigation of any kind.

The immigration judge failed to make any effort to correct, amend, clarify, alter or modify her false statements, even after being notified of the falsity of the statements. Thus, it appears plain that the misrepresentations of the immigration judge were intentional and designed to discourage a disciplinary investigation of her conduct.[2]

Petitioner asserted that the conduct of the immigration judge in this regard constituted a material and relevant external factor relevant to the adjudication of the recusal issue and as such, the matter should have been remanded to the agency. The Court of Appeals refused to acknowledge the occurrence of this incident at all and provided no explanation as to why this incident was insufficient to constitute an external factor mandating remand for further consideration of Petitioner's recusal request. Even though this incident arose subsequent to the conclusion of the removal proceedings, the fact that an immigration judge would make multiple material misrepresentations to a disciplinary authority on matters related to her handling of the Petitioner's removal proceeding, constituted sufficient evidence of prejudice and bias warranting review of the fairness

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[2]The DC and Virginia Bars declined to discipline the immigration judge in deference to a then pending investigation by the Department of Justice. That entity has concluded its investigation without "further" action.

and impartiality of the adverse determinations rendered in the Petitioner's removal proceedings.
-Claimed Insufficient Evidence-

The Court of Appeals determined that there was no evidence of record to support the recusal request. In doing so, it ignored the fact the immigration judge and agency prosecutor waived the need for any such documents when they failed to assert insufficient documentation either during the proceedings before the immigration judge or prior to the entry of the BIA decision.

The Court rejected the Petitioner's request for remand notwithstanding the fact that all of the relevant original evidence was within the sole and exclusive possession of the Executive Office For Immigration Review as it was comprised of hearing transcripts of other proceedings adjudicated by the immigration judge in question and included documents contained in the record of proceedings maintained by EOIR. Petitioner asserted clearly that Counsel no longer represented the individuals whose cases were cited in the recusal request and no longer had access to their files. Accordingly, Petitioner provided a sufficient justification as to why the documents identified by the Board sua sponte were not present in the file.

This explanation was, however, ignored as the Court simply relied on the fact that the documents were not in the record. It took no note of the fact that the issue of insufficient documentation was raised for the first time by the Board and the Petitioner was provided no notice or opportunity to amend the record

prior to the Board's denial of the appeal. Nor did the Court of Appeals give proper weight to the fact that the immigration judge and agency prosecutor waived this issue by not asserting it prior to the entry of the removal order by the immigration judge or by the Board. Thus, despite the fact that the content of the evidence deemed missing was delineated specifically by the Petitioner such that the cases in question could be identified, the evidence was obtainable and the agency never made a timely challenge to the recusal request on the basis of insufficient evidence, the Court of Appeals refused to remand the proceedings.

-Respondent's Exclusive Possession of The Documents In Support of Remand-

On federal appeal, the Respondent contended in its appellate brief, that Petitioner: "... makes wide-ranging allegations against the Immigration Judge not based on this record, but instead based on his counsel's personal experiences in other cases...Such assertions of counsel in a brief, unsupported by the record, are not evidence. See, eg., *Carrillo Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003)" . The Respondent does not mention, however, that neither the agency nor the immigration judge presented any challenge based on insufficient evidence prior to the conclusion of the administrative proceedings.

Notwithstanding the fact that both parties conceded that the evidence referenced sua sponte by the Board was relevant and material, the Court of Appeals refused Petitioner's motion for remand. In essence, the Court of Appeals has permitted the

Respondent to prevail on an issue not presented in a timely manner, one that was not actually raised by a party to the proceeding, and one of which Petitioner had no notice prior to the Board's adverse action or an opportunity to correct the asserted defect or explain why no correction was possible.

It can not be denied and, in fact has not been denied that the Board of Immigration Appeals is the custodian of all of the relevant original documents. This fact is highly relevant to any assertion that the record is incomplete, yet it was completely ignored by the Court of Appeals as was the fact that the Respondent has a clear self interest in not producing the records in its possession that it claims are missing, because the production of the documents would reflect poorly on the agency and the immigration judge. For reasons outlined above, Petitioner does not have the requested information and the Court of Appeals was well aware that the documents could only become available through the assistance of the Respondent, yet it refused to remand the proceedings for the purpose of including the documents into the record.

It is especially troubling that Respondent, as a quasi judicial governmental agency, affirmed the denial of Petitioner's recusal request on the basis of inadequate documentation when it is in actual possesses the documents it claims are missing as it, standing in the place of the Department of Justice, and the Department of Homeland Security, have the obligation to advance the cause of justice, rather than find excuses to obstruct justice. *United States v.*

Reynolds, 345 US 1, 73 S.Ct. 528 (1953). [See also, *Berger v. United States*, 295 US 78, 55 S.Ct. 629 (1934) stating: "(T)he interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts...so that justice shall be done..." (Id at footnote 1)

Though the burden of producing evidence would normally fall on the Petitioner, inasmuch as no timely notice as to this legal challenge was presented to the Petitioner, in this case, justice required the Court of Appeals to remand the case and require that the Respondent make the evidence available since the evidence is known to exist, Petitioner no longer has no access to it, the evidence is within the exclusive control of the Respondent, and the evidence is relevant to proper consideration of the allegations against the immigration judge and the DHS attorney.

Respondent did not proffer any explanation as to why it has not provided the relevant evidence, nor did the Court of Appeals require any such explanation prior to denying the Petitioner's petition for review. -3rd Circuit's departure from its own precedent.-

Additionally, the Court of Appeals failed to discuss why the Petitioner's assertions of judicial bias and prejudice were deficient in view of the standard set forth in *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982), 28 USC sections 144 and 455 or agency regulation, 8 CFR section 1240.1(b) or any of its own precedential decisions related to the abusive conduct of immigration judges as have been referenced above.

II.

The determination of the Court of Appeals that the government's evidence when "taken together" met the sufficiency requirements established in *Woodby v. INS* was plain error as the documents, when viewed separately or together, fail to establish that the Petitioner was convicted for an aggravated felony, the sentencing imposed refuted the aggravated felony determination and the determination stands in contradiction to the decision of the Circuit Court in *Jeune v. Attorney General*, 476 F.3d 199 (3rd Cir. 2007)

-State of the Law-

An alien is not subject to removal from the United States on the basis of alleged criminal conduct unless the agency has presented clear and convincing evidence of that criminal conduct. *Woodby v. INS*, 385 US 276 (1966) Additionally, the ability of the agency to meet its burden of proof regarding an alien's removability is central to any proceeding as it is jurisdictional in nature. *Murphy v. INS*, 54 F.3d 608 (9th Cir. 1995) Moreover, an agency violates the due process rights of litigants before it where it fails to follow its own policies, procedures and rules, even without further showing of prejudice or harmful error. *Accardi v. Shaughnessey*, 347 US 260 (1954) Aliens in removal proceedings are entitled to proceedings that are fundamentally fair and in accord with their constitutional right to due process. *Dia v. Ashcroft*, 353 F.3d 228 (3rd Cir. 2003); [See also *Colmanar v. INS*,

210 F.3d 97 (9th Cir. 2000)

-The Agency's Aggravated Felony Assertion -

The agency alleged and charged that the Petitioner was removable due to several convictions, including criminal conspiracy to commit an unspecified offense, occurring on September 6, 1995, before the court of Common Pleas, Lancaster, Pennsylvania. The agency submitted evidence regarding this conviction including a sentencing sheet from Lancaster County Pennsylvania that indicated that several of the original criminal charges connected to the conspiracy offense had been nol prossed and that the only offense for which the Petitioner was convicted was for something designated as "CC".

The Immigration and Nationality Act does not permit an alien's removal from the United States on the basis of the government's presentation of any evidence. Rather, the evidence in support of removal must, by law, be both clear and convincing. *Woodby v. INS* (supra) Moreover, the agency may not establish the alien's removability on the basis of an inference or presumption of correctness, such as silence due to the exercise of the alien's rights under the fifth amendment, etc. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991) In view of this important principle, the law has long required that where there is doubt as to an alien's removability, the doubt should be resolved in favor of the alien. *Fong Haw Tan v. Phelan*, 333 US 6 (1948) Importantly, the Respondent's own precedential decisions have also followed this line of thought. [See, *Matter of G-*, 9 I&N Dec. 159 (AG

1961); *Matter of Chartier*, 16 I&N Dec. 284 (BIA 1977)]

-Error of the Court of Appeals-

The Court of Appeals accepted as clear and convincing evidence, documents that were unsigned by the Petitioner, his criminal attorney, or the criminal court judge and, thus, had no indicia of reliability regarding the nature of his conviction.[3] There was no evidence that the documents in question were ever

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[3]The Court Of Appeals indicated that all of the documents submitted by the agency were admissible to prove the criminal conspiracy conviction pursuant to 8 C.F.R. section 1003.41. Its assertion was incorrect. One document, the affidavit of probable cause, was not admissible as proof of the Petitioner's removability. It was not a document prepared by a court, an official record of a judgment and conviction, an official record of a plea, verdict, and sentence, a docket entry from a court, a transcript or official minutes of a court proceeding, an abstract of a record of proceeding prepared by a court, or any other document attesting to a conviction that is maintained by a detention facility. In essence, the document is a police report. See, *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996) Though the court appears to have likened the document to a charging record, the government did not proceed with its prosecution of Petitioner upon reliance of that document, rather, it prosecuted the Petitioner by advancement of an information.

the court accepted the veracity of the documents and their suitability as proof, notwithstanding the fact that the evidence that did not contain either the criminal court docket number or reference to any specific criminal charge as proof that the Petitioner committed a removable offense, based on its assertion that the documents "taken together" were sufficient proof.

Further, it accepted as sufficient proof of the Petitioner's aggravated felony status, a document entered by the criminal court that makes no reference to a finding of guilt having been entered with respect to any offense that is an aggravated felony, with no reference to any criminal statute, that is specified only in terms of the abbreviation "CC", and on which the only offense that could be deemed to be an aggravated felony, possession with intent to distribute marijuana contains a specific notation that the charge was nol prossed.

Additionally, though the immigration judge and Board of Immigration Appeals determined that the Petitioner was bound by former counsel's entry of pleas regarding the charges of removal and accompanying allegations, for reasons detailed above, serious concerns regarding the fairness and impartiality of the immigration judge existed that should have caused the Court of Appeals to apply the *Woodby* standards more carefully.

-Adverse Determination Stands in Conflict With *Jeune*-

The determination of the Court of Appeals is

especially troubling in view of its holding in *Jeune v. Attorney General*, 476 F.3d 199 (3rd Cir. 2007). In *Jeune*, the Court reaffirmed its finding in *Garcia v. Attorney General*, 462 F.3d 287 (3rd Cir. 2006), that not all felony convictions arising under 35 PA CS section 780- 113(a)(30) that relate to offenses prohibited controlled substance offenses, including possession with intent to distribute drugs, constitute aggravated felonies as it is not clear that the statute, categorically, contains a trafficking element.

In *Jeune*, the court specified that it could only look to the records of the state conviction to determine whether the alien's specific offense constituted an aggravated felony. The only available documents upon which it could rely in *Jeune* were the charging document, sentencing sheet and certificate of probation. In contrast, the documents available to the court in *Garcia* included a charging document that specifically detailed the facts underlying the criminal prosecution that in turn justified a finding that the alien was an aggravated felon. Hence, an explanation exists as to why the documents presented in *Jeune* were deemed to be insufficient to support the aggravated felony charge while those in *Garcia* were sufficient.

Though there were many documents presented by the agency in the Petitioner's removal case, most of the documents were defective in some regard as outlined above. Specifically, the document identified by the Court of Appeals as being one of significant importance, the criminal information, was itself flawed.

The two page criminal information contains a list of four charges on the first page and one on the second page. Three of the four charges listed on the first page are stricken. The remaining charge is Possession with intent to deliver with a notation "(Sec. 13(30))", an apparent reference to the very statute considered in *Jeune* and *Garcia* that the court determined was not "necessarily" descriptive of an aggravated felony. The document also contained an assertion that the Petitioner did possess with intent to deliver a certain quantity of marijuana. On the second page is written the phrase "Count 2", as well as an assertion that the Petitioner acted with a specific person to commit the crime of possession with intent to deliver marijuana. "Count 2" contains no reference to any statute, though page one denotes criminal conspiracy 18 PS 903(al)-F, among other offenses. The sentencing sheet indicates that the possession with intent to distribute marijuana charge was nol prossed and that the Petitioner was convicted of CC for which he was sentenced to 4 years probation.

The agency asserted that the CC reference was for criminal conspiracy to possess, with intent to deliver, marijuana. That, however, is not indicated on the sentencing sheet. The specific crime to which the "CC" referred is not indicated. It is important to remember that the possession with intent to distribute marijuana offense that government argued was the object of the alleged conspiracy, was actually nol prossed. Petitioner was found to have no liability for conduct of that nature. Notwithstanding this fact, the

agency further argued in support of its assertions, that the document titled "guilty plea colloquy" proved the alleged aggravated felony . Though the document has the Petitioner's name handwritten on it, it contains no criminal number, nor any reference to any criminal offense for which a plea was being entered.

The government also submitted a form titled "plea agreement" that has the Petitioner's name hand written upon it, that asserts that two of the original charges were nol prossed and that the Petitioner was pleading guilty to criminal conspiracy and in parenthesis , the text "to PWID" "fel", as well as an offense titled "DVS". The document is dated September 6, 1995 and is signed by the district attorney. It is not, however, signed by the Petitioner or his criminal counsel.

The Petitioner asserts that the determination of the Court of Appeals that evidence submitted by the agency was sufficient, notwithstanding its decision in *Jeune* was in error. Though the information asserted that the Petitioner conspired to possess marijuana with the intent to deliver it, other documents in the record establish that the Petitioner was not actually convicted of possessing marijuana with the intent to deliver it. Further, none of the other evidence submitted by the agency in support of its aggravated felony finding establish that the Petitioner pled to that offense or that the criminal court convicted him of that offense. Thus, the Court of Appeals erred in determining that the criminal conspiracy of which the Petitioner was convicted necessarily related to the unsustained delivery of marijuana charge.

That the court erred is also clear in view of the sentence imposed upon the Petitioner. Possession of marijuana with the intent to distribute it mandates a sentence of incarceration or a fine not to exceed $250,000, or both. [See, 35 PACS section 780-113(f)] The Petitioner received neither, he was sentenced to probation. The nature of a conspiracy to possess marijuana with the intent to deliver it is of the same grade as the possession offense. Accordingly, inasmuch as a sentence of probation is not authorized for possession with intent to delivery marijuana or conspiracy to commit that offense, the criminal conspiracy for which the Petitioner was convicted could not have related to the delivery of marijuana.

Moreover, it is well established that an alien can not be deemed an aggravated felon based on conviction under a conspiracy offense unless it is established that the offense underlying the conspiracy is, itself, an aggravated felony. *Immigration Law and Crimes*, West Group (2000), 7-88.

Thus, the Petitioner's conviction could not be properly classified as an aggravated felony as the offense was not shown to be included within either of the two available theories outlined by the 3rd Circuit in *Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002) related to drug trafficking aggravated felonies. There was no evidence presented sufficient to meet the clear and convincing evidence standard. Accordingly, the assertion by the Court of Appeals that "when taken together" the evidence was sufficient as proof of trafficking or was one, though a felony, that is

analogous to any felony punishable under the Controlled Substances Act or its associated statutes was unjustified.

Before it can be asserted that evidence, when "taken together", supports an aggravated felony determination, the evidence in question has to be internally consistent as to what crime was the subject of the conviction. *Woodby*, at a minimum, requires this. It also requires that, in the case of an aggravated felony offense, sufficient proof exist that the crime is an aggravated felony and not that there be a mere inference that it is such.

The error of the Court of Appeals with respect to the aggravated felony determination was rather substantial as it deprives the Petitioner of the opportunity to obtain relief from removal in the form of cancellation of removal in view of his longstanding residence in the United States, his strong and extensive family ties in this country, his efforts at rehabilitation, employment history and numerous contributions to the community.

CONCLUSION

The decision rendered by the Court of Appeals failed to address the issue as to whether the Petitioner's assertion of bias and prejudice on the part of the immigration judge was occasioned by any of the extrajudicial factors identified by the Petitioner and failed to harmonize its adverse findings with its precedential decisions regarding judicial recusal and remand upon establishment of abusive conduct by immigration judges . Further, its adverse determination upholding the sufficiency of the agency's evidence presented in support of its assertion that the Petitioner is an aggravated felon is in disagreement with its precedential decision in *Jeune v. Attorney General* and the decision of this court in *Woodby v. INS*, 385 US 276 (1966) This Court's review is essential to settle the issue of what constitutes an external factor where judicial recusal is at issue as well as the issue of whether the *Woodby* decision permits an alien to be deemed an aggravated felon where the evidence upon which that determination has been made is conflicting, contradictory and otherwise unclear.

Sincerely,

SANDRA GREENE,
Attorney Of Record
2001 East Market Street,
York, Pennsylvania 17402
(717) 755- 8188
Attorney For Petitioner,
Michael Kirlew

Not Precedential

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-2670-06-3414

MICHAEL KIRLEW,
Petitioner
V.
ATTORNEY GENERAL OF THE UNITED STATES
Respondent

On Review of a Decision of the Board Of Immigration Appeals
Agency No. A 30093 662
Immigration Judge: Grace A. Sease

Submitted Under Third Circuit L.A. R. 34.14.1(a)
January 14, 2008
Before: FUENTES, JORDAN, *Circuit Judges*, and RUFE* *District Judge*.
(Opinion Filed: February 27, 2008)

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*Honorable Cynthia M. Rufe, United States District Judge for the Eastern District Of Pennsylvania, sitting by designation.

A-2
OPINION OF THE COURT

FUENTES, Circuit Judge

Michael Kirlew, ("Kirlew") petitions for reviewof a Board of Immigration Appeals ("BIA") decision affirming an immigration judge's ("IJ") finalorder of removal, as well as the BIA's refusal to reopen proceedings. For the following reasons, we will deny the petitions.

I.

Because we write for the parties' benefit, we will recite only those facts necessary to decide this matter. Kirlew is a 41 year old native and citizen of Jamaica who entered the United States on September 11, 1973. In 2005, the Department of Homeland Security ("DHS") issued two notices alleging that Kirlew was removable for having been convicted of the following crimes: (1) carrying a firearm without a license in violation of 18 Pa Con. Stat. Section 6106(a)(2) (the "Firearms Conviction"); (2) criminal conspiracy to deliver a controlled substance in violation of 18 Pa. Cons. Stat. Section 903 (the "Conspiracy Conviction") and (3) possession of marijuana (the " Marijuana Conviction"). The DHS alleged that these convictions rendered him removable from the United States as an alien convicted of two aggravated felonies, 8 U.S.C. Section 1227(a)(2)(A)(iii), Section 1101(a)(43)(B) & (U), as an alien convicted of a controlled substance offense, 8 U.S.C. Section 1227(a)(2)(c), and as an

alien convicted of a controlled substance offense, 8 U.S.C. Section 1227(a)(2)(B)(i).

Kirlew appeared before an IJ and conceded these convictions. He then obtained new counsel and filed a series of motions. First, he filed a motion asking the IJ to release him on bond. The IJ denied this motion, finding sufficient evidence in the record of Kirlew's criminal convictions. Kirlew then filed a motion to withdraw his earlier admissions, claiming the DHS had insufficient proof of his convictions. The IJ also denied this motion, holding that the DHS met its burden of presenting clear and convincing evidence of Kirlew's removability.

Kirlew then filed a motion asking the IJ to recuse herself from this matter. He claimed that the IJ's decision denying bond, her failure to permit him to withdraw his earlier admissions, and her overall attitude during the proceedings evidenced her bias. In a written opinion, the IJ denied this request. The IJ then issued an oral decision finding Kirlew removable and ordering him removed to Jamaica.

Kirlew appealed the IJ's decisions to the BIA, which affirmed. The BIA found that Kirlew's removability was based on "abundant conviction records produced by the DHS..." (Administrative Record ("A.R.") 23.) The BIA also held that Kirlew did not demonstrate sufficient good cause to withdraw his concessions of removability. Furthermore, the BIA held that Kirlew's motion for recusal was "unsupported by the record." (A.R. 3) Kirlew then petitioned this Court for review.

While his petition was pending, Kirlew moved before the BIA to reopen his proceedings and reconsider its decision, which the BIA denied. Kirlew then filed a second petition with us seeking review of the BIA's denial of this motion. We consolidated both petitions for review.

II.

We have jurisdiction to review a final order of removal under 8 U.S.C. Section 1252. The BIA's factual findings are reviewed for substantial evidence, 8 U.S.C. Section 1252(b)(4)(B), and its legal determinations are reviewed de novo. *Wang v. Ashcroft*, 368 F.3d 347, 349 (3rd. Cir.2004) . Furthermore, we will review the BIA's denial of Kirlew's motion to reopen for abuse of discretion. *Borges v. Gonzales*, 402 F.3d 398,404 (3rd Cir. 2005). Under the abuse of discretion standard, the BIA's decision will be reversed if it is arbitrary, irrational, or contrary to law. *Fidaga v. AG of the United States*, 488 F.3d 142, 153 (3rd Cir. 2007).

III.

Kirlew first argues that the evidence establishing the Conspiracy Conviction violates the requirement of *Woodby v. INS*, 385 U.S. 276, 286 (1966), that removal orders be based on "clear, unequivocal, and convincing evidence." We disagree. The record contains an Order from the Court of Common Pleas, Lancaster County, recording that Kirlew was convicted of Criminal Conspiracy (A.R. 231), which is supported by the NCIC printout (A.R. 220), the

Criminal Information listing the charge (A.R. 232-33), his written guilty plea to this offense (A.R. 234-36), as well as the Complaint and Affidavit of probable cause relating to this offense (A.R. 237-38). Furthermore, each of these documents is admissible to prove the existence of the Conspiracy Conviction. See 8 C.F.R. Section 1003.41.

Kirlew raises a number of argument directed towards the sufficiency of these documents. His arguments are mainly directed at the clarity of the records, some of which use abbreviations to describe the term "criminal conspiracy", and some of which are unsigned by him. We reject each of these arguments as the documents submitted by the government, taken together, clearly and unequivocally establish that Kirlew was convicted of the Conspiracy Conviction. Accordingly, Kirlew is removable for this offense.[1]

IV

Kirlew next contends that he is not removable for the Firearms Conviction because it was a "licensing offense" and not a "possession offense" under 8 U.S.C. Section 1227(a)(2)(c). We disagree. Contrary to Kirlew's assertion, the statute under which he

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[1]Kirlew also raises a sufficiency of evidence argument regarding the Marijuana Conviction, which he claims was later vacated on May 11, 2006. Since Kirlew raised this argument in his motion to reopen, we will address it below in our discussion of the motion to reopen. See infra Part VI.

was convicted does not merely criminalize the non-licensing of a weapon - it penalizes the carrying of a weapon without a license. See 18 Pa. Cons. Stat. Section 6101(a)(2) (providing that any "person who is otherwise eligible to possess a valid license under this chapter but carries a firearm...without a valid and lawfully issued license" is guilty of a misdemeanor (emphasis added)). Because the Firearms Conviction penalized Kirlew for carrying a firearm, he is removable for that conviction as charged by the government. See 8 U.S.C. Section 1227(a)(2)(C) (providing that an alien is removable for being convicted of "carrying" or conspiring to "carry" any weapon in violation of the law.)

V.

Kirlew next argues that the BIA erred in affirming the IJ's refusal to recuse herself because of judicial bias. After reviewing the record, we conclude that the IJ's conduct did not require recusal. Kirlew's argument that the IJ's attitude towards his counsel evidenced her bias is unavailing. While the IJ was perhaps impatient with Kirlew's counsel at times, it is notable that she adjourned the matter on two occasions so Kirlew could pursue various avenues of relief. (A.R. 86, 99-100) Any hostility expressed by her behavior can be characterized as those "expressions of impatience, dissatisfaction, annoyance and even anger" that are expressed by judges on occasion and which do not rise to the level of a due process violation. See Litkey v. United States, 510 U.S. 540, 555-56 (1996) Moreover,

we can not base a finding of bias merely on repeated adverse rulings, id. At 555, nor can counsel's personal experiences with the IJ in other matters, which are not contained in the administrative record, constitute evidence we can consider in a petition for review. Accordingly, the BIA's ruling on this issue will not be disturbed.[2]

VI.

Finally, Kirlew challenges the BIA's denial of his motion to reopen and reconsider. Kirlew sought to reopen his proceedings because his Marijuana Conviction was subsequently vacated and, therefore, he argued that he was entitled to relief under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. section 1182(c) (repealed 1996), for the Firearms Conviction and Conspiracy Conviction. In addition, Kirlew argued that the matter should be reopened because his first attorney rendered ineffective assistance of counsel. Kirlew also sought reconsideration of the BIA's previous decision because he claimed the it "failed to articulate any legal standard, statutory , case law or regulation in support of its legal conclusion" (A.R. 7) (emphasis in original)

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[2]Kirlew also argues that counsel for DHS during the proceedings did not make a good faith argument justifying his contention that the IJ was not biased. Since we hold that the IJ's conduct did not justify a finding of bias, we also reject Kirlew's contentions regarding the conduct of the DHS's counsel.

and improperly discounted his claims of bias regarding the IJ.

Because the BIA properly affirmed the IJ's denial of recusal, we will affirm the BIA's decision not to reopen the matter on that ground. Furthermore, while the record validates Kirlew's claim that his Marijuana Conviction was subsequently vacated, he would still be unable to obtain Section212(c) relief because of the Firearms Conviction. See *Caroleo v. Gonzales*, 476 F.3d 158, 165 (3rd Cir. 2007) (holding that Section 212(c) relief is unavailable to a lawful permanent resident convicted of a firearms offense qualifying under 8 U.S.C. Section 1227(a)(2)(c)) (citing *Komarenko v. INS*, 35 F.3d 432 (9th Cir 1994)).

Furthermore, as the BIA correctly found, Kirlew's ineffective assistance of counsel claim must fail because he did not provide the BIA with an affidavit detailing this claim, nor did he notify the relevant disciplinary authorities of his charges. In *Matter of Lozada*, 12 I &N Dec. 637, 639 (BIA 1988), the BIA held that an alien raising an ineffective assistance of counsel claim in a motion to reopen must present the foregoing information. We have previously upheld the BIA's use of the *Lozada* test in adjudicating motions to reopen for ineffective assistance of counsel. See, e.g., *Mudric v. A.G. of the United States*, 469 F.3d 94, 100 (3rd Cir. 2006). Because Kirlew did not satisfy the requirements of *Lozada*, the BIA did not abuse its discretion in denying the motion to reopen on this ground.[1]

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[1]Kirlew claims that he submitted an amended motion

VII.

For the foregoing reasons, we will deny the petitions for review.

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to reopen which met the strictures of *Lozada*. This amended motion, though is not reflected in the certified administrative record, nor does the record indicate that Kirlew ever sought to supplement his pleadings before the BIA. Furthermore, it is worth noting that, as to Kirlew's ineffective assistance of counsel claim, Kirlew could not show prejudice. As chronicled above, the DHS's evidence was more than sufficient to prove his removability, and he was not eligible for Section 212(c) relief because of the existence of the Firearms Conviction from 1995.

APPENDIX B A-10

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 220412

File: A30 093 662- York Date June 16, 2006
In re: MICHAEL DWITE KIRLEW a.k.a. Andrew Kirlew

IN REMOVAL PROCEEDINGS
MOTION
ON BEHALF OF RESPONDENT: Sandra Greene, Esquire

APPLICATION: Reopen and reconsideration

The respondent moves to reopen and reconsidr our decision dated April 27, 2006, dismissing his appeal from an Immigration Judge's November 30 2005 order or removal against him. The respondent contends that on May 11, 2006, his 2001 conviction for marijuana possession was vacated. However, the Respondent has only submitted a rather poor quality copy of a court document that apparently does not on its face establish that the conviction was vacated. Even assuming that the conviction was vacated, the respondent has not presented evidence demonstrating whether his plea of guilty was vacated for "reasons solely related to rehabilitation or immigration hardships" or "on the basis of a procedural or substantive defect in the

underlying criminal proceedings." *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Concerning the motion to reconsider, the respondent has failed to establish that we erred in dismissing his appeal. *See* 8 C.F.R. Section 1003.2(b)(1); *Matter of Cerna*, 20 I&N Dec.399 (BIA 1991). The respondent is merely reiterating contentions considered previously. The respondent does take issue with the assertion in our last decision that we found that his numerous filings before the Immigration Judge bordered on frivolous, and that none of the Immigration Judge's rulings contained error within our standard of review. We found that the respondent's motion for recusal included widespread, far-reaching allegations of misconduct involving alleged incidents wholly unsupported by the record, and even less germane to the issues related to the instant case. The respondent argues that a three member decision which dismissed his bond appeal on April 27, 2006 referred present counsel's complaints and her factual statement to this agency's office of General Counsel for further investigation. Even in the bond decision, however, we found that the evidence of record did not support the respondent's complaint against the Immigration Judge. The respondent has also attached letters which appear to indicate that he considers himself to be a victim of ineffective assistance of counsel, but he has not filed such a motion or complied with the procedural requirements, see Matter of Assad, 23 I&N Dec. 553 (BIA 2003); Matter of Lozada, 19 I&N dec. 637 (BIA), aff'd, 857 F.2d 10 (1st Cir. 1988).

ORDER: The motion is denied.

/s/ Frederick D. Hess

FOR THE BOARD

APPENDIX C A-13

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 220412

File: A30 093 662- York Date: April 27, 2006

In re: MICHAEL DWITE KIRLEW a.k.a. Andrew Kirlew

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT: Sandra Greene, Esquire

CHARGE:

Notice: Sec.	237(a)(2)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)]- Convicted of aggravated felony as defined in section 101(a)(43)(B)
Sec.	237(a)(2)(A)(iii), I&N Act [8 U.S.C.Section 1227(a)(2)(A)(iii)]- Convicted of aggravated felony as defined in section 101(a)(43)(U)
Sec.	237(a)(2)(C), I&N Act [8 U.S.C. Section 1227(a)(2)(C)]- Convicted of firearms or destructive device violation

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. Section 1227(a)(2)(B)(i)]- Convicted of controlled substance violation

APPLICATION: Termination of proceedings

ORDER:

PER CURIAM: The respondent, a native and citizen of Jamaica, appeals decisions issued by the Immigration Judge. During the course of this matter, the Immigration Judge issued three decisions as to different aspects of this case, all of which are raised in the respondent's appellate brief. We find the respondent's appellate arguments lack merit. Therefore, the appeal is dismissed.

The immigration judge's first decision, dated October 25, 2005, denied the respondent's request to withdraw his previous concessions of removability. The Immigration Judge's second decision, dated November 29, 2005, denied the respondent's motion for the Immigration Judge to recuse herself, apparently due to claimed personal bias by the Immigration Judge against respondent's counsel after a hearing in this matter. (Tr. At 13-20). The last decision , dated November 30, 2005, found that the respondent's prior concessions of removability would stand and in the absence of any applications for relief, the respondent was ordered removed from the United States.

We note at the outset that the respondent, through his first counsel, conceded all allegations against him, and that he was removable as charged (Tr. At 5-7). That counsel later withdrew, and present counsel represented the respondent before the Immigration Judge (Tr. At 10). The respondent immediately moved for bond redetermination, and argued through a motion that the respondent was never "arrested" under Pennsylvania criminal procedure law. A series of responses from the Department of Homeland Security ("DHS"), and replies from the respondent to those responses followed. The respondent sought to withdraw his concessions of removability, and also receive bond release, based on interpretations of Pennsylvania law. Upon the denial of those requests, the respondent then sought the recusal of the immigration judge.[1]

First, much of the respondent's filings below, and the brief on appeal, patently mixes issues of bond

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[1]The respondent's counsel argued that since DHS counsel did not explicitly deny or challenge each one of the numerous allegations of error raised by the respondent, those points should be taken as at least tacit agreement with her charges of bias and misconduct. *See* Respondent's amended reply to government's opposition to motion for recusal at 2. We reject that proposal as spurious.

eligibility with removability, despite clear instruction that bond and removal proceedings are separate and distinct. See 8 C.F.R Section 1003.19(d)(2006). *See also, Matter of P-C-M-*, 20 I&N Dec. 432, 433-34 (BIA)1991) Indeed, we echo the Immigration Judge's expression below that the respondent's arguments regarding bond determinations and the removability charge appear to be circular (Tr. At 13-20). At the very least, the respondent's attempts to insert bond-related issues into the removal proceedings below appear a means to bootstrap a collateral challenge to the respondent's prior concessions of removability. In sum, the immigration Judge's acceptance of the respondent's concessions of removability, in part based on abundant conviction records produced by the DHS has not been shown to constitute either a clear factual error, or a legal one. *Compare* 8 C.F.R. section 1003.(d)(3)(ii) *with* 8 C.F.R. section 1003.1(d)(3)(i).

Next, we find that the respondent's numerous filings before the Immigration Judge below border on frivolous, and that none of the Immigration Judge's rulings contained error within our standard of review.[2] The respondent's motion for recusal includes widespread, far-reaching allegations of misconduct

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[2]Although moot in light of the respondent's concessions, we would request that the Immigration Judge mark all conviction records as exhibits in the future, even where convictions are admitted at the outset.

involving alleged incidents wholly unsupported by this record, and even less germane to the issues relating to the instant case. The respondent's motion to withdraw concessions of removability does not demonstrate sufficient good cause for such an action, particularly where bond and removability issues are so intertwined as to render the arguments in support of such an action nearly oblique. See *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986).

In light of the respondent's concessions of removability, and the failure to demonstrate any prejudicial error under our relevant standard of review, the Immigration Judge's final decision of November 30, 2005, is affirmed, and the appeal is dismissed.

/s/ Roger D. Pauley

FOR THE BOARD

APPENDIX D A-18

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
York, Pennsylvania

File A 30 093 662 November 30, 2005

In the Matter Of

MICHAEL DWITE KIRLEW,) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGES: 237(i)(2)(a)(iii), 237(a)(2)(A)(iii), 237(a)(2)(C), 237(a)(2)(i)

APPLICATION: None

ON BEHALF OF RESPONDENT:
Ms. Sandra Greene, Esquire

ON BEHALF OF DHS:
Maureen C. Gaffney, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Jamaica who was issued a Notice to Appear on June 6, 2005. This is followed by an I-261, which was issued on August 18, 2005. In the Notice To Appear the respondent was charged with being subject to removal

pursuant to provisions of Section 237(i)(2)(a)(iii), as defined in Section 101(a)(43)(B) and 101(a)(43)(U) of the Act, and Section 237(a)(2)(C). These charges of removability were predicated upon his convictions. One on September 6, 1995 for the crime of criminal conspiracy to deliver a controlled substance to 2,250 grams of marijuana in violation of Title 18, Pennsylvania Consolidated Statute, Section 903 and a conviction on April 17, 1995, for the offense of firearms not to be carried without a license. In the I-261, the respondent was charged with being subject to removal pursuant to the provisions of Section 237(a)(2)(B)(I), for having been convicted in Montgomery County Pennsylvania for possession of marijuana on September 20, 2001. At a master calendar appearance on September 7, 2005, the respondent, through counsel, admitted the allegations on the Notice To Appear, and stand removable as charged. He was granted a continuance to explore avenues for relief from removal. When the respondent returned, he had obtained new counsel he sought to withdraw the pleadings previously entered. The court denied this application to withdraw, having reviewed the documents , having determined that the respondent was in fact removable as charged. The respondent sought a bond, contending that he had not been arrested for the offense in 2001. However the Court, could not find that he had not been arrested inasmuch as the NCIC didn't agree that he was not arrested and the Court was not provided with any summons or any

alternative that could lead us to believe that he had not been arrested, and thus, not subject to mandatory detention provisions.

The respondent seeks no relief from removal although he was convicted of an aggravated felony. It was 1995 the respondent may have eligible for Section 212(c) relief for that offense, however, because of his conviction in 2001, he would not be eligible for any waiver that would have waived the immigration consequences of that second (indiscernible) offense. Nor is there any immigration waiver that could have waived the firearms offense. In order to have obtained any relief from that, the respondent would have had to have an immediately available visa, would have had to apply for adjustment in conjunction with Section 212(c) relief. And again, even then, that combination of relief would not have made him whole in terms of the immigration consequences of his activity. The Third Circuit Court of Appeals in Rodriguez v. Munoz, 2005, Westlaw 1949915, determined that a 212 (c) waiver does not eliminate an aggravated felony conviction for Section 240A(a) purposes. In essence, what the Third Circuit of Appeals held was that, an individual having been, even though he may have been granted a Section 212(c) waiver for offenses prior to 1996, if he had committed another offense, another non-aggravated offense made him removable after having been granted a 212(c), he would not be eligible to apply for Section 240A(a).

Accordingly, it appears that the respondent has no

relief from removal. He has declined to apply for any other form of protection. In the form of withholding or deferral of removal pursuant to the provisions of Convention Against Torture. Accordingly, the following orders are entered.

ORDER

IT IS ORDERED that the respondent be and is found removable pursuant to Section 237(a)(2)(A)(iii) as defined in Section 101(a)(43)(B) and 101(a)(43)(U) of the Act.

IT IS ORDERED that the respondent is found removable pursuant to Section 237(a)(2)(C).

IT IS FURTHER ORDERED that the respondent is removable under the terms of 237(a)(2)(B)(i) of the Act

IT IS ORDERED that the respondent be removed to his country of nativity and citizenship Jamaica.
Done and ordered this 30th day of November 2005.

A 30 093 662 November 30, 2005

Grace A Sease
Immigration Judge

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
YORK, PENNSYLVANIA

File A 30 093 662
IN THE MATTER OF
) IN REMOVAL PROCEEDINGS
Michael KIRLEW,)
Respondent)
)

ON BEHALF OF RESPONDENT:
Sandra Greene,
50 Mount Zion Road
York, PA

ON BEHALF OF DHS/ICE:
Raphael Sanchez
Assistant Chief Counsel
York, PA DHS/ICE

DECISION OF THE IMMIGRATION JUDGE ON RESPONDENT'S MOTION FOR RECUSAL

The respondent is a male, native and citizen of Jamaica who was issued a Notice to Appear on June 6, 2005. He was charged with being subject to removal pursuant to the provisions of Section 237(i)(2)(a)(iii), as defined in Section 101(a)(43)(B),(U) of the Act, Section 237(a)(2)(C) and Section 237(a)(2)(B)(I) of the Act for having been convicted of a controlled

substance offense. The two aggravated felony charges and the weapons charge are based upon convictions prior to 1996.[1] The controlled substance offense is predicated upon a conviction in 2001.

The respondent initially appeared for a master calendar on August 18, 2005. He was advised of his rights and granted a continuance to September 7, 2005 to obtain counsel. When the respondent returned on September 7, 2005, he was accompanied by counsel Stephen D. Converse. Through counsel he admitted the allegations in the Notice to Appear on September 7, 2005 and conceded removability pursuant to Sections237(a)(2)(A)(iii) as defined in sections 101(a)(43)(B) and (U) of the Act, and Section 237(a)(2)(C). He also admitted allegation #6 on the Form I-261, Additional Charges of Inadmissibility/Deportability and conceded removability pursuant to Section 237(a)(2)(B)(i) of the Act. Jamaica was designated as the

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[1]On April 17, 1995, the respondent entered a plea of guilty to violation of Section 6106 of the Crimes Code of Pennsylvania for carrying a firearm without a license. Other charges were nolle pross'd. *Tab D, DHS Evidence, August 18, 2005.* On September 6, 1995, the respondent entered a guilty plea to a felony conspiracy charge of possession with intent to deliver marijuana, count 2. Counts 1 and 3 were nolle pross'd. *Tab C, DHS Evidence, August 18, 2005.* On September 20, 2001, the respondent entered a guilty plea to possession of marijuana. *Tab D, DHS Evidence, August 18, 2005.*

country for removal purposes. Counsel sought and we granted a continuance to September 29, 2005, to determine if any relief was available. On September 27, 2005, the Court received a motion to withdraw from Mr. Converse indicating that the respondent had obtained other counsel. The motion was granted.

At the continued hearing on September 29, 2005, the respondent's new counsel, Ms. Greene filed a motion for release on bond, contending that the respondent had not been convicted of an aggravated felony arguing that the 1995 conviction documents establish that the respondent had only been convicted of a firearms offense and that the remaining charges were nolle pross'd. She also contended that the respondent had not been arrested for the 2001 marijuana offense. The Court continued the proceeding to allow the parties the opportunity to brief the issue.

Counsel Greene subsequently filed a motion seeking to withdraw pleadings to the Notice to Appear entered by previous counsel, asserting that the government had not met its burden of establishing the respondent's removability by clear and convincing evidence. See *Woodby v. INS*, 385 F.2d 276 (1996). Counsel contends that the respondent was not convicted of an aggravated felony and that the weapons offense of which he was convicted does not fall within the purview of Section 237(c)(3)(B). Counsel Greene contended that the evidence submitted by the government is insufficient to meet the burden of establishing removability.

After reviewing the evidence submitted by the government, the Court was once again satisfied that the respondent was convicted of criminal conspiracy and that the conspiracy was that of possession with intent to deliver. See *Tab C, DHS Notice of Intent to Offer Evidence, August 18, 2005*. The Court determined anew that the respondent's conviction for carrying firearms without a license was an offense within the purview of Section 237(a)(2)(C) of the Immigration and Nationality Act. Section 237(a)(2)(C) provides that an individual may be removable for having been convicted "under any law of purchasing, selling, offering for sale, exchanging , using, owning, possessing or carrying or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part or accessory which is a firearm or destructive device, as defined in Section 921(a) of Title 18, United States Code." The Court also determined that the respondent had indeed been convicted of possession of marijuana in 2001. The Court denied the motion to withdraw pleadings.

Respondent also sought a bond contending that he had never been arrested for the 2001 offense and thus was not subject to the mandatory detention provisions of section 26(c)(1)(B). The Pennsylvania Rules of Criminal Procedure do provide that in certain offenses a summons rather than an arrest warrant may be served. However the Court was provided with no evidence that the respondent had indeed been issued a summons for this offense. The NCIC (rap sheet)

indicates that he was arrested for this offense.[2] Accordingly, the Court denied the respondent's motion for bond.

Respondent through counsel, has filed a motion to recuse. Respondent's attorney asserts that the immigration judge should recuse herself because she is biased.

Legal Analysis

Recusal is a process under which a judge is excused or disqualifies him or herself from presiding over a case in which he or she may have an interest or may be unduly prejudiced. The federal regulations provide for withdrawal and substitution of immigration judges, and the regulations state, in part, "The immigration judge assigned to conduct the hearing shall any time withdraw if he or she deems herself or himself disqualified." See 8 C.F.R. Section 40.1(b)(2001).

Recusal, however, is not a tool which parties,

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[2]The issue of whether the respondent was arrested for this offense only goes to the issue of eligibility to apply for a bond. At this juncture, the respondent has two aggravated felony charges of removability and one weapons charge of removability prior to 1996, and one controlled substance charge of removability after 1996. The only relief he appears to be eligible to apply for is that of deferral of removal under aegis of the provisions of the Convention Against Torture.

including judges, can arbitrarily invoke to rid themselves of unpleasant or difficult cases. Rather, recusal, is mandated only in certain clearly delineated cases. Indeed, judges have an obligation not to recuse themselves in certain circumstances. See United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) (declaring that "A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation). This obligation is to prevent parties from using recusal as an excuse to judge or forum shop, as well as to preserve the integrity of the judicial process. See Martin-Trigona v. Lavien, 573 F.Supp. 1237, 1242 (D. Conn. 1983)

The Board of Immigration Appeals has addressed the issue of recusal in *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982). In *Exame*, the BIA recognized three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceedings; (2) when the immigration judge has a personal bias stemming from an "extrajudicial" source; and (3) when the immigration judge's judicial conduct demonstrates "such pervasive bias and prejudice." *Matter of Exame*, 18 I&N Dec. At 305-306 (quoting *Davis v. Board of School Comm'rs of Movile County*, 517 F.2d 1044 (5th Cir. 1975)).

In *International Business Machines, USA v. International Business Machines*, 618 F.2d 923, 929 (2nd Cir. 1980), the Court stated,

> "However, we cannot agree that adverse rulings by a judge can per se create the appearance of

> bias under section 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest. As Mr. Justice Frankfurter noted in Wilkerson v. McCarthy, [citations omitted] 'A timid judge, like a biased judge, is intrinsically a lawless judge.'"

The fact that an Immigration Judge may be viewed as disagreeable or even rudeis not a due process violation. See *Kuciemba v. INS* , 92 F.3d 496, 501 (7th Cir. 1996)(["The petitioner cannot succeed on a due process claim merely by characterizing the [I]mmigration [J]udge as cranky...overly abrupt or intimidating..."); *Ivezaj v. INS*, 84 F.3d 215 (6th Cir. 1996) ("[Even if] the IMMIGRATION JUDGE was overly abrupt or intimidated [the petitioners]...[they] have no right not to have their feelings hurt by a 'no nonsense' IJ"); *Aguitar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (observing that the Immigration Judge's conduct "reflected nothing more sinister than a modicum of impatience" and was "not the stuff from which a due process violation can be fashioned."); see also *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994).

The respondent contends that the Immigration Judge is biased because she would not allow him to withdraw pleadings and because she would not grant him a bond. The Court has again reviewed the conviction documents and the evidence submitted